

MEMORANDUM

To: Town Council
From: Ronald M. Bolt, Esq.
Subject: Eligible Uses of ARPA Funds
Date: September 5, 2021

This memorandum provides a summary of the American Rescue Plan Act of 2021 and the permissible purposes for which funds may be spent by the Town, according to such law and the U.S. Treasury's implementing regulations and rules.

I. Background

The American Rescue Plan Act of 2021 ("ARPA" or the "Act") authorizes expenditure of an estimated 1.9 trillion dollars to aid in the national recovery from the COVID-19 pandemic. The Act includes provisions to supply \$350 billion to state and local governments. Specifically, Subtitle M of the Act (Sec. 9901), regarding Coronavirus State and Local Fiscal Recovery Funds, amends Title VI of the Social Security Act (42 U.S.C. 801, *et seq.*), to provide aid to local governments, including municipalities.

The U.S. Census Bureau does not have a singular definition of "municipality." Different states use different terms. Thus, the Act uses the term "nonentitlement unit of local government" ("NEU") to generally refer to sub-county local governments. Essentially, these are local governments that serve less than 50,000 residents and/or are not metropolitan cities.

II. Spending Options

There are generally two ways that a NEU, including the Town, can use Coronavirus State and Local Fiscal Recovery Funds ("Funds"). Funds can be directly spent by a NEU for four (4) purposes, discussed below. Alternatively, if funds cannot be spent, or if a NEU elects not to spend Funds, the Funds can be transferred. With respect to both options, direct spending and transferring, the Funds must be used in some manner than bears a sufficient nexus with the Town, unless transferred to the State, as discussed below.

A. Sufficient Nexus with the Town

Neither the Act, nor the Regulations or Rule expressly address whether a NEU may use funds outside its jurisdiction or whether transferred Funds may be used outside the transferor's jurisdiction. Certain statements in the Act and within the Rule, however, indicate that funds are meant to be spent by each NEU within their jurisdictions. For example, per ARPA, NEUs receive funds "to mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease (COVID-19)." Sec. 603(a). Governments are funded throughout the

nation to address fiscal impacts on a local basis. This suggests that each NEU should spend the funds to address local effects. As stated in the Rule, the Funds “are intended to provide support to State, local, and Tribal governments (together, recipients) in responding to the impact of COVID-19 and in their efforts to contain COVID-19 on their communities, residents, and businesses.” Rule, p. 26787 (emphasis added). The Rule further states that, “State, local, and Tribal governments have flexibility to determine how best to use payments from the Fiscal Recovery Funds to meet the needs of their communities and populations.” Rule, p. 26789 (emphasis added). Thus, this indicates that there ought to be a nexus between the Town “community” and the Town’s spending of the Funds.

Also, as will be discussed below, the Rule indicates by use of an example that (with respect to transfers) “county A” cannot give funds to “county B” for expenditure in county B because use of the funds in county B would not be an “eligible use” of county A’s funds. On the other hand, as also discussed below, a recipient may transfer funds to a government outside its boundaries, “provided that the recipient can document that its jurisdiction receives a benefit proportionate to the amount contributed.” FAQ, no. 4.9. Moreover, as noted below, non-profit and private organizations are advised in the Treasury’s FAQs to “seek funds from [Fund] recipient(s) in their jurisdiction” (emphasis added). FAQ’s, no. 1.8. These statements collectively indicate that the Town’s Funds should be used in the Town or in sufficient relation to a Town or regional project.

B. Direct Spending - the Four Specific Eligible Use Categories

Per the Act, Section 603(c), a NEU, including the Town, “shall only use the funds ... to cover costs incurred...”:

“(A) to respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID–19) or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;

(B) to respond to workers performing essential work during the COVID–19 public health emergency by providing premium pay to eligible workers of the metropolitan city, nonentitlement unit of local government, or county that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work;

(C) for the provision of government services to the extent of the reduction in revenue of such metropolitan city, nonentitlement unit of local government, or county due to the COVID–19 public health emergency relative to revenues collected in the most recent full fiscal year of the metropolitan city, nonentitlement unit of local government, or county prior to the emergency; or

(D) to make necessary investments in water, sewer, or broadband infrastructure.”

1. Limitations on Uses

The expenditure of Funds is subject to the requirements specified in the Interim Final Rule adopted by U.S. Treasury and published in the Federal Register, at Vol. 86, No. 93 (May 17, 2021), and the Code of Federal Regulations, 31 CFR Part 35. Comments were solicited on the Interim Final Rule, through July 16, 2021. The date the Final Rule will be published is unknown at this time. <https://www.govinfo.gov/content/pkg/FR-2021-05-17/pdf/2021-10283.pdf>

Limitations on use that are expressed in one section of the Rule concerning an eligible use do not necessarily apply to a different eligible use discussed in another section of the Rule. For example, the Interim Final Rule provides that, regarding Eligible Use A (public health and economic impacts):

“Certain uses would not be within the scope of this eligible use category, although may be eligible under other eligible use categories. A general infrastructure project, for example, typically would not be included unless the project responded to a specific pandemic public health need (e.g., investments in facilities for the delivery of vaccines) or a specific negative economic impact ... ARPA explicitly includes infrastructure if it is ‘necessary’ and in water, sewer, or broadband”. Rule, p. 26796 (emphasis added).

Thus, the need to respond “to a specific pandemic public health need” applies to Eligible Use A.1 (public health impacts) and the need to respond to “a specific negative economic impact” applies to Eligible Use A.2 (economic impacts). The requirements discussed in this section of the Rule do not apply, however, to, e.g., Eligible Use D (infrastructure). The Rule explains that Eligible Uses in Category D are subject to different limitations and requirements; they must be “necessary” and “in water, sewer, or broadband.” Rule, p. 26796.

2. Use Requirements

A table format may prove useful in separating requirements applicable to each Eligible Use Category, as set forth in the Interim Final Rule and the Code of Federal Regulations. The requirements for each eligible use are as follows (only categories A and D are reviewed in detail in this memo, as they are seemingly more applicable to the Town at this time):

Eligible Use Category	Sub-Categories	Spending Requirements
A. Public Health and	1. Public Health	Per ARPA: “(A) to respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID–19) or its negative economic impacts, including assistance to households, small businesses, and

<p>Economic Impacts</p>	<p>2. Economic Impacts</p>	<p>nonprofits, or aid to impacted industries such as tourism, travel, and hospitality”</p> <p>1. Public Health: first “identify an effect of COVID-19 on public health, including either or both of immediate effects or effects that may manifest over months or years”, and second “assess how the use would respond to or address the identified need”, Rule, p. 26790.</p> <p><u>Specific examples:</u> COVID-19 Mitigation and Prevention (vaccination programs; medical care; COVID-19 testing; contact tracing; supporting people in isolation or quarantine; enforcing public health orders and communication efforts; implementing infection prevention measures and ventilation improvements at key settings like nursing homes, schools, and other public facilities; addressing adult depression or anxiety; addressing child mental health; addressing health inequities; assisting low-income and socially vulnerable, <i>etc.</i>); Medical Expenses (provision of care and services); Behavioral Health Care; Public Health and Safety Staff; Expenses to Improve the Design and Execution of Health and Public Health Programs; Eligible Uses to Address Disparities in Public Health Outcomes. Rule, p. 26788-91; 31 CFR Sec. 35.6.</p> <p>2. Economic Impacts: “first consider whether an economic harm exists and whether this harm was caused or made worse by the COVID-19 public health emergency” and, second, whether the support ““responds to’ the identified negative economic impact”; use “must be in response to ... the harmful consequences of the economic disruptions resulting from or exacerbated by the COVID-19 public health emergency”, Rule, p. 26794.</p> <p><u>Specific examples:</u> Assistance to Unemployed Workers; State Unemployment Insurance Trust Funds; Assistance to Households; Expenses to Improve Efficacy of Economic Relief Program; Small Business and Non-profits (assisting small business to adopt safer operating procedures, weather periods of closure, or mitigate financial hardship including providing grants to cover lost revenue to retain employees, pay rent, or other operating costs); Rehiring Staff; Aid to Impacted Industries; Addressing the Disproportionate Negative Economic Effects (services to address homelessness; affordable housing development; housing vouchers; <u>addressing educational disparities – where increases in economic hardship could have long-lasting impacts on</u></p>
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		<p>children’s educational and economic prospects). Rule, p. 26791-95; 31 CFR Sec. 35.6.</p> <p><u>Exclusions (1 and 2)</u>: general infrastructure; contributions to rainy day funds, financial reserves, or similar funds; satisfaction of obligations related to settlement agreements, judgments, consent decrees, or the like. Rule, p. 26796-97.</p>
B. Premium Pay		<p>Per ARPA: “(B) to respond to workers performing essential work during the COVID–19 public health emergency by providing premium pay to eligible workers of the ... nonentitlement unit of local government ... that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work”</p>
C. Revenue Loss		<p>Per ARPA: “(C) for the provision of government services to the extent of the reduction in revenue of such ... nonentitlement unit of local government ... due to the COVID–19 public health emergency relative to revenues collected in the most recent full fiscal year of the ... nonentitlement unit of local government ... prior to the emergency”</p>
D. Investments in Infrastructure	<p>1. Water and Sewer</p> <p>2. Broadband</p>	<p>Per ARPA: “(D) to make necessary investments in water, sewer, or broadband infrastructure.”</p> <p>1. Water and Sewer:</p> <p>“Necessary investments” include those that are eligible under Clean Water State Revolving Fund and Drinking Water State Revolving Fund programs, per the Federal Water Pollution Control Act, 33 U.S.C. Sec. 1383(c) or the Safe Drinking Water Act, 42 U.S.C. 300j-12. Rule, p. 26803; 31 CFR Sec. 35.6(e)(1).</p> <p>Note: direct spending on a “pooled”/regional project is permissible, and not a “transfer.” FAQ, no. 4.9.</p> <p><u>Examples</u>: green infrastructure investments and projects to improve resilience to the effects of climate change (rain gardens and green streets); interconnecting water systems and rehabilitating wells during an extended drought. Rule, p. 26803.</p> <p><u>CWSRF eligible examples</u>: gray infrastructure (pipe, storage, and treatment systems; sediment controls, including filter fences, storm drain inlet protection, street sweepers, and vacuum trucks) and green infrastructure (green roofs, green</p>

		<p>streets, and green walls; rainwater harvesting systems; infiltration basins; constructed wetlands; bio-retention and bio-swales; permeable pavement; riparian protection and restoration; establishment and restoration of urban tree canopy; replacement of gray infrastructure with green infrastructure).</p> <p>https://www.epa.gov/sites/default/files/2016-07/documents/overview_of_cwsrf_eligibilities_may_2016.pdf</p> <p>2. Broadband:</p> <p>Must be “designed to provide service to unserved or underserved households and businesses and that is designed to, upon completion:</p> <p>(i) Reliably meet or exceed symmetrical 100 Mbps download speed and upload speeds; or</p> <p>(ii) In cases where it is not practicable, because of the excessive cost of the project or geography or topography of the area to be served by the project... (A) Reliably meet or exceed 100 Mbps download speed and between at least 20 Mbps and 100 Mbps upload speed; and (B) Be scalable to a minimum of 100 Mbps download speed and 100 Mbps upload speed.” 31 CFR Sec. 35.6(e)(2); Rule, p. 26804-5.</p>
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C. Indirect Spending - Transfers

In addition to directly spending Funds for one or more of the above four eligible purposes, a NEU can also transfer funds to: (i) a private no-profit organization; (ii) a public benefit corporation involved in the transportation of passengers or cargo; or (iii) a special-purpose unit of state or local government. Act, Sec. 603(c)(3). However, such transfers are subject to certain requirements, discussed below. Generally, transfers allow Funds to be indirectly spent by a NEU.

Additionally, a NEU can elect to transfer its Funds to the State. Act, Sec. 603(c)(4) (a “nonentitlement unit of local government ... may transfer such funds to the State in which such entity is located”). Transfers to the State allow the State to spend the Funds according to the State’s discretion.¹

¹ The State of Maryland’s proposed uses are as follows:

American Rescue Plan Act (ARPA) - State Fiscal Relief

• Stabilize UI Trust Fund	\$ 1.1 B
• Support Existing Pandemic Relief	\$800 M

Per the Interim Final Rule, all sub-recipients (except the State) “are entities that receive a sub-award from a receipt [NEU] to carry out a program or project on behalf of the recipient with the recipient’s Federal award funding.” Rule, p. 26813. Thus, a NEU cannot make a general transfer to a non-profit for the non-profit to spend as the non-profit sees fit. Rather, the Interim Final Rule indicates that the spending by the non-profit must be “on behalf” of the NEU and related to a NEU program or project. (A non-profit can be supported with a direct contribution if such contribution qualifies under Eligible Use Category A (e.g., to respond to an economic impact), and such support is not subject to the transfer rules. The non-profit’s operations should benefit the Town, as discussed in the “Sufficient Nexus” section above).

Per the Rule, with respect to a transfer, “The [NEU] recipient remains responsible for monitoring and overseeing the sub-recipient’s use of Fiscal Recovery Funds and other activities related to the award to ensure that the sub-recipient complies with the statutory and regulatory requirements and the terms and conditions of the award”. Rule, p. 26813. Also, importantly, transfers “must qualify as an eligible use of Fiscal Recovery Funds by the transferor.” Rule, p. 26813. Thus, transferred funds must be spent for one of the eligible uses above.

This is further explained in the Interim Final Rule by use of an example. The Rule provides,

“For example, if a county transferred Fiscal Recovery Funds to a town within its borders to respond to the COVID–19 public health emergency, the town would be bound by the eligible use requirements applicable to the county in carrying out the county’s goal. This also means that county A may not transfer Fiscal Recovery Funds to county B for use in county B because such a transfer would not, from the perspective of the transferor (county A), be an eligible use in county A”. Rule, p. 26813.

As similarly noted in the Treasury’s FAQ’s, no. 1.8, “A transferee receiving a transfer from a recipient under sections 602(c)(3) and 603(c)(3) will be considered to be a sub-recipient and will be expected to comply with all sub-recipient reporting requirements” and “The ARPA does not authorize Treasury to provide [Funds] directly to non-profit or private organizations. Thus, non-profit or private organizations should seek funds from [Fund] recipient(s) in their jurisdiction (e.g., a State, local, territorial, or Tribal government)” (emphasis added).

<https://home.treasury.gov/system/files/136/SLFRPFAQ.pdf> (July 19, 2021)

With respect to governmental transfers, the Rule indicates that transfers are allowed to “constituent” units of a government. The Rule provides, “... local governments are authorized to transfer Fiscal Recovery Funds to other constituent units of government (e.g., a county is able to transfer Fiscal Recovery Funds to a city, town, or school district within it) or to private entities.

• Support School Reopening	\$600 M
• Transportation Service/Infrastructure	\$500 M
• Broadband Investment	\$300 M
• Supporting Marylanders in Need	\$300 M
• Everything Else	\$100 M

https://marylandtaxes.gov/RELIEFAct/docs/5-19-2021_Pandemic_Spending_Summary.pdf

This approach is intended to help provide funding to local governments with needs that may exceed the allocation provided under the statutory formula.” Rule, p. 26813. Thus, downward transfers within a government are permissible, but as noted in the “county A/county B” example above, lateral transfers among separate local governments are generally not permissible (with the exception of a transfer for a regional project, as discussed below).

The limitations and requirements for transfers, as detailed in the Interim Final Rule, are as follows (Tribal organizations and transportation corporations are not reviewed in this memo):

Transfers	Categories	Requirements
Sub-recipients	Private nonprofit organization Tribal organization Public benefit corporation involved in transportation “Constituent” units of government	Must “carry out a program or project on behalf of the” Town. Rule, p. 26813. Town must monitor and oversee the sub-recipient’s spending. Rule, p. 26813. Funds must be spent for one of the eligible uses (A, B, and D) in the table above. Rule, p. 26813.
Regional Projects		“A recipient may transfer funds to a government outside its boundaries (<i>e.g.</i> , county transfers to a neighboring county), provided that the recipient can document that its jurisdiction receives a benefit proportionate to the amount contributed.” FAQ, no. 4.9. Funds must be spent for one of the eligible uses (A, B, and D) in the table above. Rule, p. 26813.
State		None. The State does not become a “sub-recipient.” Rule, p. 26813.

Regional Projects

The Act and the Regulations do not expressly address whether governments can pool funds to collaboratively engage in regional projects. However, the Treasury’s FAQs were updated in July and indicate that such is indeed possible:

“4.9. May recipients pool funds for regional projects? [7/14]

Yes, provided that the project is itself an eligible use of funds and that recipients can track the use of funds in line with the reporting and compliance requirements of the CSFRF/CLFRF. In general, when pooling funds for regional projects, recipients may expend funds directly on the project or transfer funds to another government that is undertaking the project on behalf of multiple recipients. To the extent recipients undertake regional projects via transfer to another government, recipients would need to comply with the rules on transfers specified in the Interim Final Rule, Section V. A recipient may transfer funds to a government outside its boundaries (e.g., county transfers to a neighboring county), provided that the recipient can document that its jurisdiction receives a benefit proportionate to the amount contributed.”

Accordingly, a NEU may directly fund a regional project. The Town could, *e.g.*, collaborate with the County or another nearby jurisdiction on a project that fits within one of the Eligible Use Categories. Instead of direct funding, a transfer can also be made. With a transfer, however, the NEU would need to document the proportionate benefit received for the transfer.